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Supreme Court of the United States

October Term, 1964

No. ~~990~~ .....

MILTON A. GALAMISON, *et al.*,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANK S. HOGAN
District Attorney
New York County
Attorney for Respondent

H. RICHARD UVILLER
JOHN A. K. BRADLEY
Assistant District Attorneys
Of Counsel

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Statement

This is a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review a decision of that court, dated January 26, 1965, affirming an order of the United States District Court, Southern District of New York (CANNELLA, J.), dated August 4, 1964, granting respondent's motion to remand this case to the Criminal Court of the City of New York.

This case was argued at the same time as two separate cases from Bronx and Queens counties. This brief is submitted on behalf of New York County only. A separate brief will be submitted on behalf of the other two counties.

Background

This case is made up of cases which originated in three separate counties and which were separately removed to the United States District Courts for the Southern and Eastern Districts of New York, which duly remanded each case. In the United States Court of Appeals for the Second Circuit the petitioners made a motion to consolidate the cases. Although this motion was denied the cases were argued together and decided in one opinion.

On March 27, 1964, the petitioners were arrested by members of the Police Department of the City of New York. Said petitioners were charged with violating the Penal Law of the State of New York, Section 722, subdivision 2 (disorderly conduct); 1851 (resisting a public officer in the discharge of his duty); 2036 (unlawful intrusion on real property); 2092 (unlawful assembly). Petitioners Howard Quander and Herbert Callender were further charged with violating Penal Law, Section 244 (assault in the third degree).

As appears from the complaints filed in the Criminal Court of the City of New York, all of the petitioners are charged with placing themselves in hallways and on staircases inside New York's City Hall in such a manner as to obstruct the normal business routine thereat. Petitioners Rice and Bronson are charged with chaining themselves to

the staircase. Petitioners Quander and Callendar are charged with assault on a police officer. All petitioners were charged with disorderly conduct in that they obstructed passageways and refused to desist until ordered to do so.

All petitioners were released on bail by a Justice of the Criminal Court of the City of New York. The amounts of bail ranged from $500.00 to $1,000.00 with respect to some of the charges, and petitioners were paroled on the other charges. On arraignment, all of these cases were adjourned, at the request of petitioners, to April 15, 1964.

On April 15, 1964, the cases were again adjourned, at the request of the petitioners, to April 29, 1964. On that adjourned date, April 15, 1964, a petition was filed for removal of said proceedings from the Criminal Court of the City of New York, County of New York, to the United States District Court, Southern District of New York, pursuant to Title 28, Section 1443, subdivisions 1 and 2, of the United States Code. Service was made on the Office of the District Attorney, in the Criminal Court Building, by physically handing a copy of the papers to the Assistant District Attorney in charge of the case at the time scheduled for trial.

On May 14, 1964, respondent made a motion, to remand the case to the Criminal Court of the City of New York, County of New York, returnable on May 26, 1964. The motion was adjourned to June 9, 1964, then to June 30, 1964, and then again to July 28, 1964, each time at petitioners' request.

The adjournment on June 30, 1964 was by written stipulation. That stipulation provided that if petitioners sought to file depositions they should serve copies of such depositions on the District Attorney on July 20, 1964. Instead, on July 13, 1964, petitioners served notice that they would take such depositions on July 20, 1964. On July 17, 1964, respondent moved to quash the subpoenas, and for an order that depositions not be taken. This motion was returnable on July 28, 1964. On July 20, 1964 one of these persons who had been subpoenaed appeared but Honorable Edmund L. Palmieri declined to order that the deposition to be taken in view of respondent's motion to quash the subpoenas and that depositions not be taken.

Thereafter, on July 28, 1964 and July 29, 1964, all motions were argued before the Honorable John M. Cannella. This was the first time answering papers to respondent's May 14, 1964 motion to remand were served—some two months after they were initially due.

The District Court, on July 29, 1964, denied petitioners' motion for a hearing, granted respondent's motion to set aside the notice to take depositions and quash subpoenas, and granted the motion to remand the case to the Criminal Court of the City of New York. An order so remanding the case was signed by the Honorable John M. Cannella on August 4, 1964.

The petitioners requested and received an order staying the proceedings in the Criminal Court of the City of New York, signed by the Honorable Sterry R. Waterman, dated September 1, 1964. An application by petitioners to con-

solidate this case with other cases arising in Bronx County was denied on September 10, 1964, by the Honorable Thurgood Marshall.

After the decision of the Court of Appeals, the proceedings in the Criminal Court were again stayed by the Court of Appeals pending an application to this Court for certiorari.

The Relevant Statutes

28 U. S. C. 1443—Civil Rights Cases

> Any of the following civil actions or criminal prosecutions, commenced in a state court may be removed by the defendant to the district court of the United States for the district division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

Section 1443 stems from Section 3 of the first Civil Rights Act, 14 Stat. 27 (1866), which follows:

> "*And be it further enacted*, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses com-

mitted against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof."

Section 901 of the Civil Rights Act of 1964 reads as follows:

"An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."

POINT I

The decision below effectuates the intent of Congress.

In this case the petitioners sought removal of state criminal prosecutions to the United States District Courts. They originally sought removal under 28 U. S. C. 1443(1) and 28 U. S. C. 1443(2) but on appeal to the United States Court of Appeals pressed this point under 1443(2) only. The two subsections of 1443 are fundamentally different. 1443(1) permits removal when there is a showing of discriminatory enforcement. 1443(2) permits removal, regardless of whether or not enforcement is discriminatory, when the petitioner can show that he did the acts charged under color of authority of some right granted by Civil Rights legislation.

The decision below is apparently the first time an appellate court has ruled on 28 U. S. C. 1443(2). However, since that decision is correct, there being no other reason to do so, this Court should not grant a writ of certiorari. This case started in the New York City Criminal Court after the petitioners had been arrested and charged with various common misdemeanors and offenses committed during a "sit-in" in the New York City Hall. The petitioners subsequently removed it to the United States District Court for the Southern and Eastern Districts of New York, which in turn remanded it to the New York City Criminal Court. Thereafter, the Court of Appeals for the Second Circuit affirmed the remand. Although at first the petitioners sought removal under both subsections of 28 U. S. C. 1443, they did not press their

claim under 1443(1) on appeal and are now seeking removal only under 1443(2).

It is only since the enactment of Section 901 of the Civil Rights Act of 1964 that the granting of an order of remand has been appealable. The legislative history behind Section 901 reveals that Congress was concerned with the line of decisions leading up to *Kentucky* v. *Powers,* 201 U. S. 1 (1906), which held that there could only be removal when a state statute or constitution deprived the defendant of his rights. Since such provisions are now rare if they exist at all, Congress felt that to breathe life into the removal provisions, the federal appellate courts re-examine with fresh eyes the rule of those old decisions. Congress made it clear that by passing Section 901 it was asking the courts to re-examine on a case by case basis a subject that was too complex to yield readily to new substantive legislation. However, since those decisions all involve the predecessor of 1443(1) and not of 1443(2), there is no indication that Congress wanted the Courts to broaden removal under 1443(2).

The clearest statement of intent was made by Senator Dodd who stated that he was discussing the section specifically lest the question of legislative intent be raised. Senator Dodd said that the cases interpreting the section that is now 28 U. S. C. 1443 made erroneous interpretations of the Congressional intent behind the Acts of 1866 (which includes the predecessor of Section 1443). He went on to say:

> "It is particularly important it seems to me, that the right to a fair trial free from racial hostility and antagonism should be guaranteed. This is what the

> Congress of 1866 tried to do. This is what the removal statute will do if properly construed." 110 Congressional Record 6739 (1964).

Senator Dodd went on to say that Congress was rejecting the idea of specifying what kinds of cases should be removed because this would involve technical difficulties in drafting and should be handled on a case by case basis.

Senator Humphrey, floor manager for the bill, added his voice to the same effect saying that the cases appear

> "to hold that the right of removal is limited to situations in which a State statute or constitution on its face denies equal rights. However the real problem at present is not a statute which is on its face unconstitutional; it is the unconstitutional application of a statute. When a State statute has been unconstitutionally applied, most Federal district judges presently believe themselves bound by these old decisions and remand attempted removal to the State courts. Under present law such a remand is unappealable. As a consequence, the right to remove civil rights cases is of very little use. Enactment of title IX will give the appellate courts an opportunity to re-examine this question." 110 Congressional Record 6331 (1964).

In the House, Representative Kastenmeier spoke to the same effect saying:

> "we are only asking that the law, frozen as it has been for almost sixty years so that the civil rights provisions of removal are almost useless, be reviewed, the power of appeal from the district court orders of removal be granted, and also, incidentally that the Court of Appeals be authorized to reinterpret these laws. It would seem that under reinterpreta-

> tion of Section 1443 cases involving State criminal prosecution brought to intimidate the petitioner, cases involving such community hostility that a fair trial in State or local courts is unlikely or impossible, and other such cases as set forth certain conditions which would seem likely or certain to preclude a fair trial, might now well be construed to be within the scope of said section. If so, once again we will breathe life into the Civil Rights Acts of 1866 and give meaning to the purpose intended." 110 Congressional Record 2675 (1964).

From the foregoing it is absolutely clear that the intent of Congress was to allow the courts to re-examine the *Kentucky* v. *Powers*, 201 U. S. 1 (1906), line of decisions, and to ensure that cases will be removed when the defendant cannot obtain a fair trial.

It is clear from the foregoing that Congress in 1964 was solely concerned with 1443(1). This case does not involve that subsection but only 1443(2). Therefore although Section 901 of the Civil Rights Act of 1964 permits appellate review in cases arising under both subsections of 1443, there is no Congressional mandate to the courts to review 1443(2).

This Court should be aware in passing upon this petition that in *Rachel* v. *State of Georgia*, —— F. 2d —— (March 5, 1965), the Fifth Circuit in reversing an order granting a motion to remand, held that a valid claim had been made out under 1443(1).

The petitioners' claim that the decisions in this case and in *Rachel* v. *State of Georgia, supra*, represent a conflict in the circuits. However, since the decision in this

case rests on 1443(2) and that in *Rachel* on 1443(1) there is no conflict. Instead, a just result has been obtained by the two decisions. In the instant case, the court below was faced with a request to broaden 1443(2) to cover all claims under the First and Fourteenth Amendments. Had the court allowed such removal, 1443(2) would have ceased to be "an adjunct to the substantive civil rights statutes enacted by Congress," *Rachel* v. *State of Georgia*, *supra*, cited with approval in petitioners' brief, page 10, but instead would have become a gateway through which would have poured a host of state cases unrelated to civil rights, as that phrase is normally construed, into the Federal courts. On the other hand the Fifth Circuit in *Rachel* by allowing removal where the petitioner claimed that he could not get a fair trial effectuated the intent of Congress "that the right to a fair trial free from racial hostility and antagonism should be guaranteed." Speech of Senator Dodd, 110 Congressional Record 6739 (daily ed. April 6, 1964).

POINT II

28 U. S. C. 1443(2) covers only officers and those persons assisting them. It does not cover the petitioners.

To understand the scope of 1443(2) it is more helpful to refer back to its predecessor Rev. Stat. §641 which remained unchanged until reworded by the Revisers of 1948. It is fair to refer back to the earlier version of the Statute since the revision of 1948 was a mere recompilation of the United States Code which was not intended to have any substantive effect. That section reads as follows:

"When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending."

The words "or other person" in the second part of 641 following as they do the words "any officer, civil or military" would seem by the rule of *ejusdem generis* to take the meaning of any other person similar in kind to an officer. This construction would also follow since the "person" would have to be defending himself for arresting another, in other words for doing something in the nature of the duties of an officer. In the words of the opinion below:

"'Arrest or imprisonment, trespasses or wrongs,' were precisely the probable charges against enforcement officers and those assisting them; and a statute speaking of such acts 'done or committed by virtue of or under color of authority derived from' specified

> laws reads far more readily on persons engaged in some sort of enforcement than on those whose rights were being enforced, as to whom words like 'acts founded upon' would have been much more appropriate" (—— F. 2d ——).

An example of what Congress had in mind can be seen in 42 U. S. C. 1989 which is derived from the same law as 28 U. S. C. 1443. Section 1989 empowers commissions to "call to their aid the bystanders or posse comitatus."

POINT III

The petitioners were not acting under any color of authority.

Although the words "color of authority" as used in this section have not previously been the subject of judicial determination, the same phrase elsewhere has been frequently ruled on. In each case the interpretation placed on it has been limited to acts authorized by a specific statute or if not authorized then such acts as could not have been performed except with apparent official authority.

In *Maryland* v. *Soper* (No. 1) 270 U. S. 9 (1925), federal revenue officers were charged with the murder of a person whom they claimed in their petition they found wounded when they raided a still. They claimed to have been engaged in the discharge of their duties at the time of the killing. The Supreme Court granted a writ of mandamus and returned the case to the state court holding that there must be a

> "* * * casual connection between what the officer has done under the asserted official authority and the state prosecution. It must appear that the prosecution of him, for whatever offense, has arisen out of the acts done by him under the color of federal authority and in enforcement of federal law, and he must by direct averment exclude the possibility that it was based on acts or conduct of his not justified by his federal authority."

Soper indicates that when a person claims to be acting under "color of authority" he must show that the act with which he is charged is closely related to the authority under which he is supposedly acting. It is clear that conducting a "protest in or about the offices of the Mayor of the City of New York," as alleged in the petition, was not done under authority of "any law providing for equal rights"—there being no law authorizing anyone to sit-in in the office of the Mayor.

The distinctions between acting under authority, under color of authority and without authorization are explicitly set forth in *Screws* v. *United States*, 325 U. S. 91 (1945), in which this Court, although reversing for other reasons the conviction of state officers for depriving a defendant of his civil rights, held that the officers who were making an arrest acted with "color of authority" even when they exceeded their authority and beat the defendant to death. This Court stated, at page 111:

> "Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. It is clear that

> under 'color' of law means under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it."

Certainly by no stretch of the imagination can the holding that an officer who oversteps his authority nevertheless acts with "color of authority" be extended to those who claim the "authority" of a general constitutional provision.

The farthest this Court has gone in holding that an unauthorized act was done with "color of authority" was in *Monroe* v. *Pape*, 365 U. S. 167 (1961), in which Chicago police officers were being sued civily under 42 U. S. C. 1983 for depriving a defendant of his civil rights by searching his home without a warrant. In the face of a vigorous dissent this Court relying on its decision in *United States* v. *Classic*, 313 U. S. 299 (1941), held that, "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law" (at p. 184).

The gulf between *Monroe* and the instant case is immense. The petitioners cannot show any authority at all for obstructing the functioning of City Hall. Consequently they were not exceeding the authority or acting under a pretense or color of authority.

POINT IV

The Constitution is not a "law providing for equal rights" within the meaning of 1443(2).

Once again it is preferable to go back to an earlier version of the statute to determine its meaning. As originally enacted as §3 of the Civil Rights Act of 1866 the section provided for removal for acts done "under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees." Subsequently the statute was changed by the Revised Statute of 1875 to read "under color of authority derived from any law providing for equal rights as aforesaid." This in turn was contracted in 1948 by the deletion of the words "as aforesaid." Clearly at first the section only applied to limited statutory rights dealing with those sections that provided that all shall be equal rather than those that provided rights for all. There is no indication in the legislative history that Congress intended to change the meaning of this section at the time it revised the wording. That, indeed, the contrary is true was pointed out by the court below (p. 988) in saying that Congress even hired a lawyer to make sure that the 1875 version contained no substantive changes.

It is not hard to envision the peril to the federal system that would follow from the adoption of a broader view of the meaning of "law providing for equal rights" so as to include Constitutional provisions. Under such a view presumably all 800 students arrested at Berkeley could remove their cases as involving acts committed under the

color of authority of the First Amendment. Similarly, cases involving obscenity prosecutions, prosecutions for the practice of professions without a license, and for carrying arms would also be removable. Such a wholesale removal would have the effect of terminating the federal system so far as it concerns criminal prosecutions. Certainly such a construction and such a result would depart from the previous "lodestar of adjudication" that the Civil Rights Act "should be construed so as to respect the proper balance between the States and the federal government in law enforcement" and that the Act "was not to be used to centralize power so as to upset the federal system." *Stefanelli* v. *Minard*, 342 U. S. 117, 121 (1951).

POINT V

The cases were correctly remanded without a hearing.

The charges in the Criminal Court of the City of New York are all for simple misdemeanors or offenses. These cases are tried without a jury before panels of one or three judges. The fact situations are simple. Consequently the trials are short. To hold hearings in the District Court would in effect be to try the cases there. Consequently to have hearings would be to try each case twice. This would be an unnecessary burden on the courts.

Where the facts are few and simple the pleadings will sufficiently inform the court so that it can make a decision.

Conclusion

The application for a writ of certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County
Attorney for Respondent

H. RICHARD UVILLER
JOHN A. K. BRADLEY
Assistant District Attorneys
Of Counsel

April, 1965